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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1497

CATHERINE C. ALFREE, Appellant

v.

EDWIN W. ALFREE, JR., Appellee

APPEAL FROM THE SUPREME COURT
OF THE STATE OF DELAWARE

JURISDICTIONAL STATEMENT

STEPHEN B. POTTER, ESQUIRE
DAVID R. HODAS, ESQUIRE
JAMES R. LEONARD, ESQUIRE
Counsel of Record for Appellant
POTTER & CARMINE, P.A.
One Customs House Square
Suite 590
P. O. Box 1207
Wilmington, DE 19899

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, Catherine C. Alfree, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Judgment entered by the Supreme Court of the State of Delaware in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion appealed from of the Supreme Court of the State of Delaware appears at 410 A.2d 161 and is included herein as Appendix "A", (p.p. A-1). The opinion of the Supreme Court of the State of Delaware dated August 16, 1979, is included herein as Appendix "B", (p.p. A-8). The opinion of the Superior Court dated February 2, 1979, was unreported and a copy is attached hereto as Appendix "C" (p.p. A-10).

GROUNDS OF JURISDICTION OF SUPREME COURT

JURISDICTION

This Appeal arises from an action to recover compensatory damages for personal injuries arising from an automobile accident which occurred on June 26, 1976. The judgment of the Supreme Court of the State of Delaware was entered on the 26th day of December, 1979. A timely notice of appeal was filed on the 24th day of March, 1980, in the Supreme Court of the State of Delaware and in the Superior Court of the State of Delaware. The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. §1257(2). This appeal draws into question the validity of Delaware statutory law on the ground that it is repugnant to the Constitution of the United States, and the decision appealed from was in favor of its validity.

The judgment appealed from was rendered on December 26, 1979, and a timely notice of appeal was filed on March 24, 1980, in the Supreme Court of the State of Delaware and the Superior Court of the State of Delaware, in and for New Castle County.

The following cases are believed to sustain jurisdiction over this appeal: Williams v. Bruffy, 96 U.S. 176, 24 L.Ed. 716 (1878); Railroad Co. v. McClure, 77 U.S. 511, 19 L.Ed. 997 (1871).

STATUTES INVOLVED

For purposes of 28 U.S.C. §1257(2) the Delaware statute which is being considered with respect to its validity is the common law doctrine of interspousal tort immunity. The doctrine states:

> "That one spouse may not sue the other in tort".

This common law doctrine of interspousal tort immunity is the controlling law in the State of Delaware based upon Delaware's Constitution of 1897, which incorporates the common law of England into the law of the State of Delaware. Section 18 of the Schedule to the Delaware Constitution of 1897 provides:

> "All laws of this State existing at the time this constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws."

The common law of England is part of the law of the State of Delaware. It was first adopted in the Constitution of 1776, Article XXV. The same section was reenacted in each of the three succeeding constitutions. The Constitution of 1792, Article VIII, §10; The Constitution of 1831, Article VII, §9; and most recently in §18 of the Constitution of 1897. Thus, the Doctrine of Interspousal Tort Immunity constitutes a statute for purposes of this appeal.

QUESTIONS PRESENTED

Does the Delaware doctrine of interspousal tort immunity deny a married individual life, liberty or property without due process of law and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF CASE

The facts of the case underlying this appeal are as follows:

This action arises out of an automobile accident which occurred on June 26, 1976, in Kent County, Delaware. On that date plaintiff Catherine C. Alfree was an occupant of a 1957 Chrysler Newport, operated by her husband, Edwin W. Alfree, Jr.

The accident in issue occurred on County Route 90, approximately one half mile west of the town of Smyrna and seven tenths of a mile north of County Route 145. At that time and place the vehicle in which plaintiff was a passenger, was travelling at an excessive rate of speed, left the road and struck a utility pole and tree. As a result of this accident, Mrs. Alfree sustained numerous serious injuries, including a right leg amputation. Another passenger in the vehicle, one James Starkey, lost his life in this same collision. As a result of his wanton and reckless acts, Mr. Alfree plead nolo contendere to the crimes of failing to keep a proper lookout and failing to maintain proper control of his vehicle for which he was sentenced to a period of imprisonment. The parties to the present action are separated and Mr. Alfree has indicated to Mrs. Alfree that he is presently living with another woman and is taking steps to secure a divorce.

Prior to the accident, Mrs. Alfree was employed at a job which required that she work in a standing position for extended periods of time. Since the accident she has been unemployed for all but one month when she attempted to return to her job, but found she was unable to perform her duties due to the amputation of her leg. Presently Mrs. Alfree is on public assistance and has responsibility for caring for her children.

A law suit was filed on or about the 22nd day of September, 1977, in the Superior Court of the State of Delaware, in and for New Castle County, in which Catherine Alfree sought to recover damages for Mr. Alfree's negligent, wanton and reckless conduct.

Based upon these facts, defendant-appellee, filed a motion for summary judgment which was granted February 2, 1979. The Court granted defendant summary judgment in his favor based upon the doctrine of interspousal tort immunity. Plaintiff filed a notice of appeal on February 8, 1979, to the Supreme Court of the State of Delaware where the issue of interspousal tort immunity was briefed and orally argued before a three Judge panel of the Supreme Court of the State of Delaware. On August 16, 1979, the three Judge panel affirmed the lower court's order granting summary judgment.

Plaintiff then filed a motion for rehearing en banc pursuant to Temporary Rule 200 and a motion for reargument pursuant to Rule 18 of the Supreme Court of the State of Delaware Rules. On September 28, 1979, the Court granted plaintiff's request for a rehearing before the Court en banc. In its order granting the rehearing, the Supreme Court of the State of Delaware sua sponte requested the parties to exchange briefs on the following question:

> "Does the doctrine of interspousal tort immunity, as established by the Delaware case law, violate the plaintiff's due process or equal protection rights under the Fourteenth Amendment of the United States Constitution?"

These issues were briefed and orally argued before the Court en banc at the rehearing.

On December 26, 1979, the Supreme Court of the State of Delaware, in a per curiam opinion, affirmed the granting of summary judgment in favor of the defendant-appellee. That decision upheld the application and doctrine of interspousal tort immunity and held that the doctrine's bar to plaintiff's cause of action did not violate plaintiff's due process or equal protection rights under the Fourteenth Amendment of the Constitution of the United States.

With respect to the constitutional issues raised by the Supreme Court and briefed and argued before it on the rehearing, the Supreme Court of the State of Delaware stated in its December 26, 1979, opinion, at 410 A.2d 163:

"Finally, as to the federal due process and equal protection clauses, little law directly applicable has been brought to our attention. The strongest precedent is Paiewonsky v. Paiewonsky, 3rd Cir., 446 F.2d 178, (181-182, 1971, Cert. denied) 405 U.S. 919, 92 S. Ct. 944, 30 L.Ed. 2d 788 (1972). In that case, our former Chancellor, now Chief Judge Seitz of the Federal Circuit which includes Delaware, writing for the three Judge panel, found no violation of equal protection in the alleged discrimination resulting from the doctrine of interspousal immunity. The Court said it '(had) not been convinced that

the immunity doctrine lacked substantial vitality' and, 'it follows that it has a reasonable relationship to the (promotion of domestic tranquility) interest sought to be furthered by it'. See also Brawner v. Brawner, Mo. Supr., 327 S.W. 2d, 808, 815 (1959). Other courts in rejecting equal protection claims have noted that the doctrine applies to husbands as well as wives. See Locklair v. Locklair, DSC 256 F. Supp. 530 530 (1960); Smith v. Smith, Pa. Super., 361 A.2d 756, 757 (1976). Due process claims have faired no better evidently on the ground that a spouse does not have a property interest in a cause of action not recognized by common law or on the ground that any such property interest in a suit against a spouse is lawfully restricted in a manner of public concern by the State's police power. Heckendorn v. First National Bank, supra., 166 N.E. 574; Brawner v. Brawner, 327 S.W. 2d at 814-815; Smith v. Smith, supra., 361 A.2d 757. Thus, based on current precedent, there appears to be no federal constitutional limitation on the interspousal immunity doctrine. We so hold."

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions in that the doctrine of interspousal tort immunity, as construed by Delaware's highest court impermissibly encumbers and interferes with a spouse's fundamental right to

marry in that it bars the spouse from suing his or her tortfeasor spouse. By barring an injured spouse from suing his or her tortfeasor spouse where such suit would be permitted absent the marital relationship, the Delaware doctrine of interspousal tort immunity deprives a married tort victim of life, liberty and property without due process of law. Furthermore, it denies the injured spouse the equal protection of the law and right to access to the courts. To the extent the rule treats spouses as a class differently from all other tortiously injured victims, the rule deprives plaintiff of the equal protection of the laws. Finally, the doctrine improperly interfers with an individuals fundamental rights of personal security and access to the courts.

THE DELAWARE LAW OF INTERSPOUSAL TORT IMMUNITY VIOLATES APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW AND DEPRIVES APPELLANT OF LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNTIED STATES CONSTITUTION.

The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution state:

> "No State shall make or enforce any law which shall. . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the United States has developed a three approaches to the application of the Fourteenth

Amendment. The first approach applies what is commonly known as the "strict scrutiny" or "compelling State interest test". The second approach is commonly referred to as either the "minimal scrutiny" or "rational relationship test". The third follows a middle path.

The first approach, the strict scrutiny test, is applied to classifications involving rights known as fundamental. They are rights such as the right to travel, to vote, to marry, etc. This test is also applied when the classification is predicated upon certain suspect classifications such as race, alienage or national origin. In the case at bar, we are not concerned with a suspect classification, we are concerned with a classification scheme involving fundamental rights.

The Delaware rule of interspousal tort immunity classifies married individuals and treats them differently from all similarly situated tortiously injured victims. Furthermore, the doctrine burdens an individual's right to marry in that it requires an individual who marries to give up his or her right to sue his or her spouse for damages should the spouse tortiously, recklessly or intentionally injure the individual. Additionally, the doctrine as applied in Delaware, has the effect of denying an injured party his or her right to petition the court for redress of a tortious wrong and thus undermines an individual's inalienable right to personal security.

Under the strict scrutiny standard there is no presumption that the law or rule in question is constitutional, rather unless the Stateshows a compelling

state interest which necessitates the rule the law is unconstitutional. Furthermore, when the strict scrutiny standard is applied the burden is placed upon the one seeking to permit the classification based on a fundamental right to demonstrate that the rule is necessary to promote a compelling governmental interest and that there is no reasonable way to achieve these goals with a lesser burden on the constitutionally protected activity. Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed. 2d 274 (1972).

The second approach, the minimal scrutiny test is normally applied in cases in which neither fundamental rights nor suspect classifications are involved. Under this standard the statute is presumed to be constitutional. Initially, the Court examines the law to determine whether its subject matter involves a legitimate concern of the State and secondly whether the statute is a reasonable tool for that purpose. The statute is sustained if the class is rationally related to a legitimate state interest and is not patently arbitrary. McGowan v. Maryland, 366 U.S. 426, 81 S. Ct. 1101, 6 L. Ed. 2d 393, (1961).

Recently the United States Supreme Court has moved away from the rigid choice between the strict scrutiny test and the minimal scrutiny test adopting, in some cases, a more equitable and flexible approach. Under this middle standard, the Court considers evidence concerning the nature of the unequal classification under attack, the nature of the rights adversely effected, and the governmental interest urged in support of the classification. After considering

all of the evidence the Court then determines whether the classification has been proven by facts to be substantially related to the object of the rule. See Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). Under this middle standard the Court examines the actual empirical relationship between the classification and its governmental object. The Court, also considers whether there is a less restrictive means of achieving these goals.

Thus, there are three tests which the Courts use in analyzing the equal protection issues presented by the facts of this particular case.

To determine which test the Court must apply, the nature of the rights at issue must be identified. It is only because of plaintiff's and defendant's marital status that we are before the Court. Absent the taking of the marriage vows Catherine Alfree could sue Edwin Alfree to recovery compensatory damages. Mr. Alfree recklessly and wantonly violated statutory standards of care designed to protect all users of the highways. If Mrs. Alfree was not the wife of the defendant, that is, had she been a passenger, another driver, a pedestrian, the driver's mother or even had she been the driver's child she would not be barred from the right to sue for damages. In fact, if Mr. and Mrs. Alfree had not married but rather had chosen merely to live together for the rest of their lives and to raise a family, then she would be able to sue for damages arising from an accident such as this. If defendant's son, mother, friend or mistress were injured they could sue to recover compensatory damages. The only passenger who could not sue would be

plaintiff. The rule of interspousal tort immunity as applied separates individuals who have exercised their fundamental right to marry from others and denies those individuals their inalienable right to personal security and their Constitutional right to access to the Courts. Thus, married individuals are penalized and the rule as applied, burdens and impinges upon plaintiff's fundamental rights of marriage, access to the courts and personal security.

A. THE STRICT SCRUTINY TEST IS APPLICABLE TO THE CASE AT BAR BECAUSE FUNDAMENTAL RIGHTS ARE DIRECTLY INVOLVED.

The "strict scrutiny" test is directly applicable to the case at bar. The right to marry is clearly implicated in this case because the rule of interspousal tort immunity is based solely on the marital relationship. The United States Supreme Court has made it clear that the right to marry underlies the purposes of the Constitution and although not expressly mentioned in it, it is a fundamental right afforded protection by the First, Fifth and Fourteenth Amendments of the United States Constitution.

> "Marriage is one of the 'basic civil rights of man' fundamental to our very existance and survival." Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010. (1967).

Similarly, in Griswold v. Connecticut, 381 U.S. 479, 495, 85 S. Ct. 1678, 1688, 14 L.Ed. 2d 510 (1965), it was observed:

> "The entire fabric of the Constitution and purposes that

> clearly underly its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."

The right to marry, although not "expressly" enumerated by the Constitution is a fundamental right which must be accorded the same protection and respect as those rights expressly enumerated in the Bill of Rights.

The case of O'Neil v. Dent, 364 F. Supp., 565 (E.D. N.Y., 1973), considered whether the United States Merchant Marine Academy could constitutionally dismiss a cadet because he married in violation of Academy regulations and his personal contract with the school. Plaintiff argued that the regulations impermissibly interfered with and encumbered his fundamental right to marry. He also argued the regulations deprived him of due process of law and to the extent the regulations treated all married students as a class differently from all others similarly situated the regulations deprived him of equal protection of the law.

The O'Neil Court held the regulations unconstitutional because the right to marry was a fundamental right and there was no compelling state interest to justify the regulations.

The government in O'Neil had argued that the regulations involved bore a rational relationship to legitimate academy purposes and that they were justified by a compelling state interest. The government asserted that the opportunity

to attend the academy was merely a privilege and as such, the no marriage rule did not deny an individual his fundamental right to marry. In response to these arguments the Court stated:

> "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . ." (Pg. 570). (Emphasis supplied).

The O'Neil Court continued:

> "That the government may not condition receipt of benefits upon the waiver direct or otherwise--of constitutionally guaranteed liberties is no longer open to question. The effect to impose such conditions has been denied repeatedly. . ." (Pg. 570).

The Court held the unconstitutional regulations could not be upheld on the ground that they simply denied access to a mere privilege. Classifying the object as a privilege does not relieve the State from the obligations of reasonableness and non-arbitrary treatment.

In this case, the right to marry is at the very heart of the rule of interspousal tort immunity. Only individuals injured through the tortious acts of their spouse are completely barred from recovering compensatory damages. Furthermore, in the case at bar we are not dealing with a "mere privilege", but rather we are dealing with additional fundamental and inalienable natural rights protected by the Constitution, the

right to personal security and the constitutional right to access to the courts.

In the case at bar the rule in question treats married individuals as a class differently from all other tortiously injured automobile accident victims and as such deprives this class of the equal protection of the laws. This class is, by application of the doctrine, deprived of their fundamental right to "personal security" and their right of "access to the courts".

> "The right of personal security is a natural right and is guarded by various provisions of the State and Federal Constitutions, derived in part from the Magna Charta and other charters of English liberty and reinforced by additional and more specific injunctions. The guarantees included in the right to personal security are secured against abridgement by the States through the Fourteenth Amendment." 16 C.J.S. Constitutional Law §205. (Emphasis supplied).

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. 16 C.J.S. Constitutional Law §205; In Bednarik v. Bednarik, NJ Ch. 16 A. 2d 80 (1940), it was established:

> "Under the English Common Law and under our American Constitutional Law, natural rights are such as appertain originally and essentially to each

person as a human being, as a member of organized society and as a citizen of free government. They are rights recognized as inherent in the individual member of the State, personal and absolute and inalienable. Among these rights is that of personal security." (Pg. 89, 90). (Emphasis supplied).

In the case at bar, the plaintiff has had this fundamental right of security violated and because she is married she is treated differently than if she were not. A corollary to this right of security is the constitutional right to free access to the courts. As was stated in California Transport v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972).

"Certainly the right to petition extends to all departments of the government. The relief of access to the courts is indeed but one aspect of the right to petition." (Pg. 646, 510).

Thus, the right to petition guaranteed by the First Amendment to the United States Constitution protects the right of all individuals to access to the Courts. Similarly, the Delaware Constitution at Article I §9, establishes:

"All courts shall be open; and every man for an injury done him in his. . .person. . .shall have remedy by due course of law, and justice administered according to the very right of

the cause and the law of the land. . ."

Thus, both the Federal Constitution and State Constitution establish that there exists a fundamental right of access to the courts to seek redress for wrongs. The right is one of the basic rights accorded individuals in an ordered, democractic society. As interpreted in Robb v. Pennsylvania Railroad, Del. Supr., 210 A.2d 709 (1965):

"It is the duty of the Courts to afford a remedy and redress for every substantial wrong." (Emphasis supplied).

It is the essence of our civil laws to achieve justice and in so doing provide redress for wrongful injury. 5 Pound Jurisprudence Ch. 32 "Duties of Reparation" 283-346 (1959); Holmes, The Common Law 76 (Howe Ed. 1963). As the United States Supreme Court has recently recognized, this great impulse of our law applies with special force in the tort area where:

". . .over the centuries the common law. . . has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by violation of his legal rights." Carey v. Piphus, 435 U.S. 247, 257, 98 S. Ct. 1042, 1049, 55 L. Ed. 2d 252, 261 (1968).

In view of the fact that there are three fundamental rights which are interfered with or burdened by the application of the rule of interspousal tort immunity, the Court should apply the strict

scrutiny test as the proper standard of review. Under this test, as previously stated, the burden is placed upon the defendant to demonstrate that the rule is necessary to promote a "compelling state interest" and that there is no other reasonable means to achieve the stated goal which would impose a lesser burden on these constitutionally protected rights. No compelling State interest exists. O'Neil v. Dent, surpa.

The reason most often proffered in support of this classification scheme is the State's interest in preserving domestic tranquility. There is absolutely no evidence in the record tending to affirmatively establish that the bar of interspousal tort immunity is factually related to the preservation of domestic tranquility. The fatal vice of the rule is that there is a sweeping advance determination that every married person who sues his spouse in tort thereby diminishes the domestic tranquility presumed to be shared by them. Courts which have recently reviewed this justification for maintaining the doctrine note that in the rare instance where a spouse will sue his or her spouse depsite the spouse's objection there is probably not much tranquility to preserve. Koplik v. C. P. Trucking Corp., NJ Supr., 141 A.2d 42 (1958). In Immer v. Risko, NJ Supr., 267 A.2d 481 (1970), the Court stated:

> "We are doubtful that the marital relationship will be any more disturbed by allowing a cause of action than by denying it. . .A person would not sue his spouse if there were perfect harmony and it is unlikely that adjudication of the rights will worsen the relationship."

In this same vein the anomaly of sustaining domestic harmony as a basis for imposing immunity has already been recognized by the Courts of Delaware in the judicial treatment of interfamily tort actions, a distinctly analogous area. The dominant philosophy underlying the rule of interfamily tort immunity was the preservation of the family relationship and this thinking has been rejected in Delaware. See Williams v. Williams, Del. Supr., 369 A.2d 699 (1976).

Another factor which should be considered in the Court's analysis is the prevalence of automobile insurance in today's society. There is no danger of domestic tranquility being disturbed by an action in tort by a spouse against a spouse who carries insurance.

> "The presence of insurance militates against the possibility that the interspousal relationship will be disrupted since a recovery will, in most cases, be paid by the insurance carrier rather than by the defendant spouse. . .Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage." (Immer v. Risko, NJ Supr., 267 A.2d 481 (1970)). (Emphasis supplied).

Thus, the danger of marital disruption becomes academic when liability insurance is available.

Finally, there is, in addition to all else, a certain mischief in the unspoken assumption at the heart of the domestic tranquility rationale, namely, that in this context courts are somehow fit to monitor marital morality. Courts can claim no penetrating insight by which to fathom the impact of an interspousal law suit or gauge its affect upon the strength or fragility of a marriage. The threat to domestic tranquility by legal action between spouses is an imponderable; the cohesiveness of a marriage may be jeopardized as much by barring the suit as by allowing it. Merenoff v. Merenoff, NJ Supr., 288 A.2d 951 (1978). The success and the happiness of a marriage belongs to the individuals themselves and the right to make decisions relating to the marriage is personal and private and should not be interfered with or burdened by a court made rule. Delaware has clearly recognized this by the recent liberalization of its divorce laws which permit "no-fault" divorce. 13 Del. C. Chpt. 15. Thus, Delaware has legislatively declared that it does not have a compelling State interest, in preserving marital harmony and tranquility. In final analysis the choice to sue or not to sue should be that of the parties to the marriage who as individuals are entitled to seek their personal happiness according to their own independent rights. It is unproven and at best extremely doubtful that economic coercion is a proper method of preserving domestic tranquility.

Application of rule deprives married individuals as a class of the equal protection of the laws. Absent the marriage relationship there is no question that the plaintiff would have the right to sue to seek compensatory damages for the

injuries done to her. Thus, the constitutionally protected right to marry is burdened by requiring married individuals to forego their individual constitutional right of access to the courts and their fundamental right to personal security. Married individuals as a class are being treated differently from others in similarly situated circumstances. They are not being deprived of a mere privilege as in O'Neil v. Dent, cited supra., but are being deprived of fundamental personal rights protected by the Constitution.

B. ASSUMING THE COURT SHOULD APPLY THE MIDDLE STANDARD THE CLASSIFICATION IMPOSED BY THE RULE IS NOT FACTUALLY RELATED TO THE PRESERVATION OF DOMESTIC TRANQUILITY.

Should the Court apply the "middle standard", plaintiff asserts that the classification involved is not, in fact, substantially related to the object of the court made rule. Applying this rationale the classification must be reasonable and not arbitrary and must rest upon some ground having a fair and substantial relation to the object of the rule, so that all persons in similar circumstances shall be treated alike. See Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-254, 30 L. Ed. 2d 225, 229 (1971).

> "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The Courts must reach and determine the question whether classifications drawn in a statute are reasonable in light of its

purpose. . ." McLaughlin v. Florida, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed. 2d 222, 228 (1964).

Thus, the question presented is whether a difference in the marital status of tortiously injured victims bears a substantial relationship to a valid state objective. Once again, the preservation of domestic tranquility is the express state objective of the rule.

In this respect, it is interesting to note that this rule and classification has never once been endorsed by the State legislature but rather is a vestigal remnant of law no longer supported by the social concepts and policies of today's society. Here, too, it is important to note that the Supreme Court of Delaware in the case of Williams v. Williams, Del. Supr., 369 A.2d 669 (1976), abrogated the rule of intrafamily tort immunity. In doing so, it permitted children, through their appointed next friend, (their father) to sue their mother for injuries resulting from an automobile accident. The children in Williams and plaintiff in the case at bar are similarly situated. Why then are they treated differently? In Williams, the father was, in essence, suing the mother, his spouse. There is no distinction between that case and the one at bar which justifies the radically different treatment imposed here by the application of a Delaware law. The classificatiton fails because it penalizes injured spouses by depriving them completely from recovering for injuries caused by their spouse. The loss of life or a limb should not become less worthy of compensation because the injured party happens to be married to the party who caused same. It is irrational to reward

a spouse by allowing him or her to abandon his duties owed to all others by denying the injured spouse from being compensated for the loss suffered. There is no rational basis for withdrawing protection from a spouse and at the same time providing protection to children, guests, pedestrians and others traveling or using the highways.

The taking of the marriage vow forms no substantial rational basis for denying plaintiff the equal protection of the law. Thus, plaintiff has been denied equal protection of the law under the middle standard.

C. THE RULE OF INTERSPOUSAL TORT IMMUNITY SHOULD NOT BE ANALYZED UNDER THE MINIMUM SCRUTINY TEST BECAUSE FUNDAMENTAL RIGHTS ARE INVOLVED AND THE MINIMUM SCRUTINY TEST IS BASED ON A POLICY OF DEFERENCE TO LEGISLATIVE PEROGATIVE NOT PRESENT IN THIS CASE.

Finally, it is necessary to discuss the applicability of the third test, the so called "minimum scrutiny" standard. This test does not apply because as previously indicated there are fundametal rights involved and due to this the minimum scrutiny test is not a proper method of analysis. Without considering the nature of the rights involved, still with respect to this test, it is plaintiff's position that it does not apply. In employing this test the courts have traditionally upheld any classification based upon any state of facts that reasonably can be conceived to constitute a distinction or difference in state policy. Thus, the application of this test is based on reasonable deference to state objectives and their formulation by the legislature.

This deference accorded the legislature's judgment is normally quite proper. It is based on the policy that the elected members of the legislature are more closely in touch with the problems, needs and preferences of the people. It is reasoned that the legislature has access to facts, as well as advice, to an extent the courts cannot equal.

In the case at bar, the "deference" embodied in the minimum scrutiny test is inapplicable. We are dealing with a classification based on the common law, a judge made rule embodied in the Delaware Constitution, and not a statute specifically enacted by the legislature. There has been no endorsement of this classification by the legislature. There has been no fact finding and no reliance on expert advice by the legislature. Rather, we are confronted with a judge made classification formulated eons ago based upon the problems, needs and preferences of a society long since past. Based upon this analysis the minimum scrutiny rule should not be employed.

D. SHOULD THE COURT APPLY THE MINIMUM SCRUTINY TEST THE RULE IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND THE DISCRIMINATIONS IMPOSED BY THE RULE ARE PATENTLY WITHOUT REASON.

Should the Court decide to apply the minimum scrutiny test then the classification to pass constitutional muster need only bear a rational relationship to the accomplishment of a valid state purpose. In this analysis, there is a presumption that the rule is constitutional.

As was stated in Stratton v. Travis, Del. Super., 380 A.2d 985 (1977):

> "Under the rational or traditional equal protection analysis, a Legislative classification may not be struck down unless it is obviously arbitrary; except in the case of a statute whose discriminations are so patently without reason that no conceivable factual situations could be found to justify them. The party who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality." (Pg. 987). (Emphasis supplied).

In this case, we are not confronted with a legislative classification. The purpose behind the questioned classification is the judicial statement that it is in the State's interest to preserve domestic tranquility. It is plaintiff's position that the classification in question is arbitrary because it is not factually related to the stated goal and its application is both illogical and unsound when viewed in a realistic fashion. Furthermore, its discriminations are patently without reason. Today's society has changed considerably since the law was originally formulated and as noted in Stratton:

> "A statute, valid when enacted, may become invalid by change in the conditions to which it is applied." (Pg. 988).

Thus, where the conditions have changed and the rule fails to bear a rational relationship to a valid state purpose, the rule must be considered unconstitutional.

In the case at bar, the rule lacks a rational relationship to the actual state of facts which surround its operation. The argument that the rule tends to enhance domestic tranquility is especially hard to take seriously when advanced by an insurance company. Either domestic tranquility has ended before the suit is brought or the situation is such that the domestic tranquility will not be affected by the action. In a practical sense, it is the injury coupled with the inability to be compensated that produces the lack of harmony. Klein v. Klein, Cal. Supr., 376 P.2d 70 (1962), Williams v. Williams, Del. Supr., 369 A.2d 669 (1976).

In the case of Rogers v. Yellowstone Park Company, Ida. Supr., 539 P.2d 566 (1975) the Court found the conjugal harmony argument to be both unsound and illogical. The Court stated:

> "It is difficult to perceive how a personal action would disrupt the tranquility of the marital estate to any greater degree than would actions in partition, ejectment or for contesting wills all of which actions now may be maintained by a wife against her husband where such actions involve her separate property." (Pg. 569).

A further weakness in the marital tranquility argument is expressed in the

case of Immer v. Risko, NJ Supr., 267 A.2d 481 (1970). The Court stated at page 484-485:

> "But realistically, it must be remembered when dealing with the question of conjugal harmony that today virtually every owner of a motor vehicle with a sense of responsibility carries liability insurance coverage. The presence of insurance militates against the possibility that the interspousal relationship will be disrupted since a recovery will in most cases be paid by the insurance carrier rather than by the defendant spouse. . . Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage. The cost of making the injured spouse whole would necessarily come out of the family coffers, yet a tortfeasor spouse surely anticipates that he will be covered in the event that his negligence causes his spouse injuries. This unexpected drain on the family's financial resources could likely lead to an interference with the normal family life. And it is doubtful that this void in insurance coverage would comport with the reasonable expectations of the insured that this Court has so often sought to protect. (Citations omitted). In short, the immunity doctrine cannot be fairly sustained on the basis that negligence suits between husbands and wives will disrupt the harmony of the family."

(Pg. 484-485). (Emphasis supplied).

Both of these arguments are persuasive here. The parties are separated. In this case Mr. Alfree left the plaintiff, his wife, Mrs. Alfree, to reside with another woman who was en ventre se mere. Prior to this tortious conduct, Mrs. Alfree was self-sustaining, however, because she lost her leg and cannot support herself on the prosthesis she is unable to supply an income for herself and her children. Currently she is on public assistance. These circumstances are far more in accord with the hard realities of life than the bromides that led to the interspousal tort immunity thesis. A bad idea should not anymore be retained because it has a history than a poor idea be adopted anew.

In the case of Williams v. Williams, Del. Supr., 369 A.2d 669 (1976), the Court was concerned with whether the doctrine of parental tort immunity should be made a Delaware rule. The principal argument advanced for maintaining that doctrine was the very same concern for preserving domestic tranquility.

In its analysis of that policy the Court stated:

> "Among the reasons for dissatisfaction with the domestic-tranquility justification is the fact that domestic tranquility has not proven a sufficient consideration to bar other types of intra-family litigation such as (1) tort actions for damage to property interests, and (2) personal injury actions against

> a sibling. (Citations omitted). Moreover, an increasing number of courts are of the opinion that the injury itself and not the consequent suit, is the factor which may upset domestic tranquility. (Citations omitted). (Emphasis supplied).

The most cogent rebuttal, however, of the domestic-discord justification is found in today's prevalence of liability insurance. In the steady erosion of the immunity doctrine, increasing emphasis is laid upon the mitigation factor which liability insurance brings into a negligence action between family members. (Citations omitted).

> Since it is the apprehension of domestic discord which, in large measure, gives rise to the immunity doctrine, to the extent liability insurance assuages that concern, it becomes a determinative consideration in deciding whether the doctrine should be adopted. . ." (Citations omitted). (Pg. 672).

Thus, the Delaware courts have recognized the faults contained in the domestic tranquility policy underlying the antiquated doctrine.

These decisions readily show the courts dissatisfaction with the logic of the argument upon which retention of the doctrine is based. This rule when originally formulated was based on a societal condition which has long since passed. Applied to today's condition, the

rule is arbitrary and the discriminations contained therein are patently without reason.

THE DECISIONS RELIED UPON BY THE DELAWARE SUPREME COURT IN HOLDING THERE ARE NO FEDERAL LIMITATIONS ON THE DOCTRINE ARE INAPPLICABLE.

The decisions relied upon by the Delaware Supreme Court in holding there are no federal limitations on the doctrine are inapplicable. In Paiewonsky v. Paiewonsky, 446 F.2d 178 (C.A. 3, 1971), cert. den., 405 U.S. 919, 30 L. Ed. 2d 788, 92 S. Ct. 944, the Court ruled against only the contention that interspousal tort immunity discriminates against women who marry in that it compels them to suffer damages without recourse available to other persons, solely because of their marital status. It is not being asserted that the Delaware Law of Interspousal Tort Immunity results in gender discrimination. Certainly such is not the case. Thus, the Delaware Courts reliance on Paiewonsky is misplaced with respect to the issue raised by the appeal.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

STEPHEN B. POTTER, ESQUIRE

DAVID R. HODAS, ESQUIRE

JAMES R. LEONARD, ESQUIRE
Attorneys for Appellant

Supreme Court, U.S.
FILED
APR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-1497

CATHERINE C. ALFREE, Appellant
v.
EDWIN W. ALFREE, JR., Appellee

APPEAL FROM THE SUPREME COURT
OF THE STATE OF DELAWARE

APPENDIX

STEPHEN B. POTTER, ESQUIRE
DAVID R. HODAS, ESQUIRE
JAMES R. LEONARD, ESQUIRE
Counsel of Record for Appellant
POTTER & CARMINE, P.A.
One Customs House Square
Suite 590
P. O. Box 1207
Wilmington, DE 19899

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

CATHERINE C. ALFREE, Plaintiff-Below, Appellant,	)	
v.	)	No. 35, 1979
EDWIN W. ALFREE, JR., Defendant-Below, Appellee.	)	

Submitted: November 14, 1979
Decided: December 26, 1979

Before HERRMANN, Chief Justice, and DUFFY, McNEILLY, QUILLEN and HORSEY, Justices, constituting the Court en Banc.

Upon appeal from Superior Court. Affirmed.

James R. Leonard, of Potter & Carmine, Wilmington, for plaintiff-appellant.

Wayne Elliott and Edward P. Welch, of Prickett, Ward, Burt & Sanders, Wilmington, for defendant-appellee.

PER CURIAM:

This personal injury action arises out of an automobile accident which occurred on June 26, 1976. At that time

the plaintiff, Catherine C. Alfree, was an occupant of an automobile operated by her husband, the defendant Edwin W. Alfree, Jr. The parties have since separated but they are not divorced.

In the Superior Court, given the factual context of the cases, the defendant's motion for summary judgment was granted on the ground of the interspousal immunity doctrine. The plaintiff appealed and, after oral argument before a three Justice panel on June 15, 1979, the panel issued a unanimous opinion, dated August 16, 1979, which affirmed the judgment of the Superior Court. Subsequent to the panel's opinion, the plaintiff moved for a rehearing before the Court en Banc.[1] On September 28, 1979, the motion was granted. In the interest of justice and in addition to matters previously raised, the Court sua sponte directed briefing and argument on whether the interspousal tort immunity doctrine violated plaintiff's due process or equal protection rights under the Fourteenth Amendment of the Constitution of the United States. Argument before the Court en Banc was

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[1]Temporary Rule 200 of this Court's rules authorizes such a motion upon any of the following grounds: the proceeding involves a question of exceptional importance; consideration by the Court en Banc is necessary to secure or maintain uniformity in Supreme Court decisions; or the case may be controlled by a prior decision of the Court which should be reconsidered or which may be overruled.

held on November 14, 1979, and this opinion of the Court en Banc supersedes the earlier panel opinion which is hereby withdrawn.

We affirm the judgment of the Superior Court.

It is settled law in Delaware that one spouse may not sue the other at law in tort. Plotkin v. Plotkin, Del. Super., 125 A. 455 (1924); Peters v. Peters, Del. Ch., 169 A. 298 (1933); duPont v. duPont, Del. Ch., 98 A.2d 493 (1953); Owens v. Owens, Del. Supr., 149 A.2d 320 (1959); Saunders v. Hill, Del. Supr., 202 A.2d 807 (1964); Fields v. Synthetic Ropes, Inc., Del. Supr., 215 A.2d 427 (1965) and Short Line, Inc. of Penn. v. Perez, Del. Supr., 238 A.2d 341 (1968). We are not persuaded that the common law rule as recognized by the Superior Court in the Plotkin case in 1924 and by the Court of Chancery and the Supreme Court since 1924 should be overruled by judicial decision. "[T]he right [of spouses] to sue each other strikes at the very heart of domestic relations and its effect not only upon the home ties, but upon society generally would be far reaching." Plotkin v. Plotkin, supra., 125 A. at 457.

We are aware of the modern, widespread criticism of the rationale of the doctrine. See e.g. Merenoff v. Merenoff, N.J. Supr., 388 A.2d 951, 958-960 (1978). ["* * * currently only a handful of courts unqualifiedly retain the doctrine in its pristine formulation" 388 A.2d at 954; and "[i]t is clear, * * *, that despite its survival in varying forms, interspousal immunity is no longer the

doctrinal monolith it was in olden times." 388 A.2d at 955.] But, nonetheless, we think that, in addition to its time-honored recognition in this State it retains sufficient merit to warrant continued adherence by this Court for two sets of reasons.

First as to tort law, elimination of the doctrine could: (1) open up the possibility of various tort actions such as assualt and intentional infliction of emotional harm which could go to the heart of public policy and legislative policy relating to marriage; (2) make many routine automobile cases by way of contribution an involuntary suit of one spouse against another; (3) make common automobile negligence issues, including assumption of the risk and guest statute questions, ones of aggravated accusation by one spouse against another; and (4) affect legislative policy in the no-fault insurance field.

Second, as to property law, we note that marriage has many protective attributes not available to others including the duty to support, the right to inherit, and the right to hold property free from assualt by a spouse's individual creditors as tenants by the entirety. Thus, the public policy relating to the marriage status is more complex than treatment of interspousal immunity doctrine in isolation would suggest.

Like the public policy considerations involved in the oft-attacked Automobile Guest Statute, the problem is "more appropriate for legislative solution than for judicial determination. The General Assembly has access to relevant

information bearing upon these matters more significant than any afforded this Court, bound as it is by the limitations of the record of this judicial proceeding." Justice v. Gatchell, Del. Supr., 325 A.2d 97, 102 (1974). "If a change is to be effected in the well-settled public policy of this State, such change must be effected by the Legislature and not by this Court." Saunders v. Hill, supra., 202 A.2d at 810.

The Delaware Constitutional provision--"every man for an injury done him . . .shall have remedy by the due course of law" [Del. Const. Art. I, Sec. 9]--does not require the courts to create a right of action unknown to the common law.[2] The interspousal immunity doctrine has not been abolished by the Married Women Acts. Plotkin v. Plotkin, supra. The case of Williams v. Williams, Del. Supr., 369 A.2d 669 (1976), limiting the application of the doctrine of parental tort immunity in automobile

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[2]For history, see: Art. I, Sec. 9 of Del. Const. of 1831; Art. I, Sec. 9 of Del. Const. of 1792; and Sec. 12 of Declaration of Rights and Fundamental Rules of the Delaware State of 1776. See also: Heckendorn v. First National Bank, Ill. Supr., 166 N.E. 2d 571, 573 (1960); Conley v. Conley, Mont. Supr., 15 P.2d 922, 926 (1932); Smith v. Smith, Or. Supr., 287 P.2d 572, 576 (1955); Gowin v. Gowin, Tex. Ct. App., 264 S.W. 529 (1924), aff'd Tex. Supr., 292 S.W. 211 (1927).

negligence cases by its express terms distinguished and reserved "for another day the question of husband-wife tort immunity under Delaware law." Id., 369 A.2d at 670; see also Schneider v. Coe, Del. Supr., 405 A.2d 682 (1979).

Finally, as to the Federal due process and equal protection clauses, little law directly applicable has been brought to our attention. The strongest precedent is Paiewonsky v. Paiewonsky, 3rd Cir., 446 F.2d 178, 181-182 (1971), cert. den., 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 788 (1972). In that case, our former Chancellor, now Chief Judge Seitz of the Federal Circuit which includes Delaware, writing of the three judge panel, found no violation of equal protection in the alleged discrimination resulting from the doctrine of interspousal immunity. The Court said it "[had] not been convinced that the immunity doctrine lacks substantial vitality" and "it follows that it has a reasonable relationship to the [promotion of domestic tranquilty] interest sought to be furthered by it. See also Brawner v. Brawner, Mo. Supr., 327 S.W. 2d 808, 815 (1959). Other courts in rejecting equal protection claims have noted the doctrine applies to husbands as well as wives. See Locklair v. Locklair, D.S.C., 256 F. Supp., 530 (1960); Smith v. Smith, Pa. Super., 361 A.2d 756, 757 (1976). Due process claims have fared no better evidently on the ground that a spouse does not have a property interest in a cause of action not recognized by common law or on the ground that any such property interest in a suit against a spouse is lawfully restricted in a matter of public concern by

the State's police power: Heckendorn v. First National Bank, supra., 166 N.E. 2d at 574; Brawner v. Brawner, supra., 327 S.W. 2d at 814-815; Smith v. Smith, supra., 361 A.2d at 757.[3] Thus, based on current precedent, there appears to be no Federal constitutional limitation on the interspousal immunity doctrine. We so hold.

Accordingly, we commend to the General Assembly the problem of reviewing the rights of a married spouse in the position of this plaintiff in this day and age.

The judgment of the Superior Court granting summary judgment to the defendant is affirmed.

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[3] We have found one case stating that the interspousal immunity doctrine must yield to Federal constitutional provisions. Alexander v. Alexander, W.D.S.C., 140 F. Supp. 925, 928-929 (1956). This decision has been expressly repudiated in: Locklair v. Locklair, supra., 256 F. Supp., at 532-533; Bencomo v. Bencomo, Fla. Supr., 200 So.2d 171, 174 (1967); and Gaston v. Pittman, N.D. Fla., 285 F. Supp., 645, 646 (1968), rev'd on grounds that a divorced woman can maintain an action against her former husband for a tort committed by him prior to their marriage [Gaston v. Pittman, Fla. Supr., 224 So.2d 326 (1969)], 5th Cir., 413 F.2d 1031 (1969).

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

CATHERINE C. ALFREE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	
	)	
v.	)	No. 35, 1979
	)	
EDWIN W. ALFREE, JR.,	)	
	)	
Defendant-Below,	)	
Appellee.	)	

Submitted: August 28, 1979
Decided: September 28, 1979

Before HERRMANN, Chief Justice, DUFFY, McNEILLY, QUILLEN and HORSEY, Justices, constituting the Court en Banc.

O R D E R

This 28th day of September, 1979,

IT IS ORDERED:

(1) That the appellant's motion for rehearing before the Court en Banc, upon the issue of the doctrine of interspousal tort immunity, be and it is hereby granted;

(2) That, in addition to the contentions of the parties previously presented, the following question be briefed and argued upon the rehearing:

Does the doctrine of interspousal tort immuity, as established by the Delaware case law, violate the plaintiff's due process or equal protection rights under the Fourteenth Amendment of the Constitution of the United States?

(3) That any additional briefs be exchanged by November 1, 1979;

(4) That oral argument upon this hearing be scheduled for the November Session of the Court.

BY THE COURT:

Chief Justice Herrmann

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

CATHERINE C. ALFREE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	
	)	
v.	)	No. 35, 1979
	)	
EDWIN W. ALFREE, JR.,	)	
	)	
Defendant-Below,	)	
Appellee.	)	

Submitted: June 15, 1979
Decided: August 16, 1979

Before DUFFY, McNEILLY, and QUILLEN as Justices.

Upon appeal from Superior Court. Affirmed.

James R. Leonard, of Potter & Carmine, Wilmington, for plaintiff-appellant.

Wayne Elliott and Edward P. Welch, of Prickett, Ward, Burt & Sanders, Wilmington, for defendant-appellee.

PER CURIAM:

This action arises out of an automobile accident which occurred on June 26, 1976. At that time, the plaintiff, Catherine C. Alfree, was an occupant of an automobile operated by her husband, the defendant, Edwin W. Alfree, Jr.

It is settled law in Delaware that one spouse may not sue the other in tort. Plotkin v. Plotkin, Del. Super., 125 A. 455 (1924) (Judges Richards and Rodney); Peters v. Peters, Del. Ch., 169 A. 298 (1933); (Chancellor Josiah O. Wolcott); duPont v. duPont, Del. Ch., 98 A.2d 493 (1953); (Chancellor Seitz) Saunders v. Hill, Del. Supr., 202 A.2d 807 (1964); (Chief Justice Terry and Justices Wolcott and Carey); Fields v. Synthetic Ropes, Inc., Del. Supr., 215 A.2d 427 (1965) and Short Line, Inc. of Penn. v. Perez, Del. Supr., 238 A.2d 341 (1968) (Chief Justice Wolcott and Justices Carey and Herrmann). We are not persuaded that the common law rule as recognized by the Superior Court in the Plotkin case in 1924 and by the Court of Chancery and the Supreme Court since 1924 should be overruled by judicial decision. "[T]he right [of spouses] to sue each other strikes at the very heart of domestic relations and its effect not only upon the home ties, but upon society generally would be far reaching." Plotkin v. Plotkin, supra., 125 A. at 457. "If a change is to be effected in the well-settled public policy of this State, such change must be effected by the Legislature and not by this Court." Saunders v. Hill, supra., 202 A.2d at 810.

The Delaware Constitutional provision--"every man for an injury done him

. . .shall have remedy by the due course of law" [Del. Const. Art. I, Sec. 9]--does not require the courts to create a right of action unknown to the common law. The interspousal immunity doctrine has not been abolished by the Married Women Acts. Plotkin v. Plotkin, supra. The case of Williams v. Williams, Del. Supr., 369 A.2d 669 (1976), by its express terms does not require a change in the husband-wife tort immunity under Delaware law. Id., 369 A.2d at 670; see also Schneider v. Coe, Del. Supr., A.2d (1979).

The judgment of the Superior Court granting summary judgment to the defendant is affirmed.

Submitted: February 1, 1979
Decided: February 2, 1979

Re: Catherine C. Alfree v.
Edwin W. Alfree, Jr.
Civil Action No. 77C-SE-79

Stephen B. Potter, Esq.
Potter & Carmine, P.A.
Suite 590
One Customs House Square
Wilmington, DE 19801

Wayne N. Elliott, Esq.
Edward P. Welch, Esq.
Prickett, Ward, Burt & Sanders
P. O. Box 1328
Wilmington, DE 19899

Gentlemen:

This action is before the Court on defendant's motion for summary judgment. He contends that the suit is barred by the doctrine of interspousal tort immunity.

On June 26, 1976, defendant was operating a motor vehicle in which plaintiff-wife and another person, James Starkey, were passengers. Traveling at a high rate of speed on County Route 90 one-half mile west of Smyrna, defendant lost control of the vehicle and struck a utility pole and tree. Mrs. Alfree suffered severe injuries including the amputation of her right leg. Starkey was killed and defendant was convicted of manslaughter as a result.

Since the accident, except for one month during which plaintiff attempted to resume her former job, Mrs. Alfree has been unemployed and currently is receiving public assistance. She is now 22 years old and since her separation from her husband has the added responsibilty of caring for her child.

It is settled law in Delaware that one spouse may not sue the other in tort. Short Line, Inc. of Penn. v. Perez, Del. Supr., 238 A.2d 341 (1968); Fields v. Synthetic Ropes, Inc., Del. Supr., 215 A.2d 427 (1965); Plotkin v. Plotkin, Del. Super., 2 W.W. Harr. 455, 125 A. 455 (1924). Although numerous jurisdictions and authorities have criticized this doctrine, it is still controlling in Delaware. Whether interspousal tort immunity is unjust and archaic is a matter to be determined by our Supreme Court. The decision of this Court is bound by the prevailing law; accordingly, the motion for summary judgment should be GRANTED. IT IS SO ORDERED.

Very truly yours,

VINCENT A. BIFFERATO

VAB:g

cc: Prothonotary
Law Library
Mr. Fred Kirch
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IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CATHERINE C. ALFREE, Plaintiff,	)	
v.	)	C. A. No. 77C-SE-1979
EDWIN W. ALFREE, JR., Defendant.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Catherine C. Alfree, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware dated December 26, 1979, affirming the judgment of the Superior Court of the State of Delaware in and for New Castle County granting summary judgment to the defendant-appellee entered in this action on February 2, 1979.

This appeal is taken pursuant to Title 28, United States Code, §1257, sub-paragraph (2).

DATED: March 24, 1980.

POTTER & CARMINE, P.A.
BY:
STEPHEN B. POTTER, ESQ.
DAVID R. HODAS, ESQ.
JAMES R. LEONARD, ESQ.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

CATHERINE C. ALFREE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	
	)	
v.	)	No. 35, 1979
	)	
EDWIN W. ALFREE, JR.,	)	
	)	
Defendant-Below,	)	
Appellee.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Catherine C. Alfree, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware dated December 26, 1979, affirming the judgment of the Superior Court of the State of Delaware in and for New Castle County granting summary judgment to the defendant-appellee entered in this action on February 2, 1979.

This appeal is taken pursuant to Title 28, United States Code, §1257, sub-paragraph (2).

DATED: March 24, 1980.

POTTER & CARMINE, P.A.
BY:
STEPHEN B. POTTER, ESQ.
DAVID R. HODAS, ESQ.
JAMES R. LEONARD, ESQ.

Supreme Court, U.S.
FILED
APR 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1497.

CATHERINE C. ALFREE,

Appellant,

v.

EDWIN W. ALFREE, JR.,

Appellee.

On Appeal From the Supreme Court of Delaware.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

MASON E. TURNER, JR.,
WAYNE N. ELLIOTT,
VERNON R. PROCTOR,
PRICKETT, JONES, ELLIOTT & KRISTOL,
1310 King Street,
Wilmington, Delaware 19801

Attorneys for Appellee.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

The Appellee moves this Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware entered on December 26, 1979, on the ground that the question on which the decision depends does not present a substantial federal question.

OPINION BELOW.

The opinion of the Supreme Court of Delaware is reported at 410 A. 2d 161 and is set forth in the Appellant's Appendix at page A-1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Fourteenth Amendment to the Constitution of the United States:

> ". . . ; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the common law doctrine of interspousal tort immunity, derived from the common law of England and retained by the State of Delaware and which was stated by the court below as follows:

> "It is settled law in Delaware that one spouse may not sue the other at law in tort." (410 A. 2d at 162).

QUESTION PRESENTED.

Does the Fourteenth Amendment to the United States Constitution guarantee a spouse the right to sue the other in tort for an alleged tort committed during coverture?

STATEMENT OF THE CASE.

On June 26, 1976, Appellant and Appellee were husband and wife, having been married in the State of Delaware and having continued to reside in the state thereafter. On that date, Appellant was a guest passenger in an automobile operated by her husband, when that automobile was involved in a single vehicle accident. Appellant sustained injuries in that accident and has sued her husband to recover money damages as a result of those injuries.

The parties are still husband and wife, although they have separated since the inception of this lawsuit in September, 1977.

Delaware law provides a two-tier mechanism for compensation for persons injured in automobile accidents. Under Delaware law, any person so injured, including the plaintiff in this action, has the automatic right to recover compensation for medical expenses, net lost earnings and certain other defined expenses pursuant to the Delaware "no-fault" insurance scheme. 21 *Del. C.* § 2118. This insurance compensation, which is mandatory under Delaware law, provides prompt, first party compensation regardless of fault and must be made available in an amount no less than the amount required for liability insurance policies under the Delaware Financial Responsibility Law, presently $10,000 per person and $20,000 for a single accident. Greater coverages are available. The challenged interspousal tort immunity doctrine is in no way implicated in the no-fault compensation scheme, and the plaintiff herein has had the benefit of such compensation.

The second tier of the Delaware compensation system permits certain injured persons to bring actions to recover damages not compensable* under the no-fault system. Thus, suit can be brought to seek recovery for pain and suffering, permanent injury, and any out-of-

pocket expenses either not covered by no-fault insurance or which exceed the available insurance coverage. A party may not, however, plead or recover items compensable under the no-fault plan. 21 *Del. C.* § 2118(g).

This second tier right of action is based upon traditional notions of fault, requiring the injured party to prove negligence of the third party, who in turn would have available such traditional defenses as contributory negligence and assumption of the risk. Moreover, Delaware law does not permit a guest passenger, such as Appellant herein, to sue her host driver based upon mere negligence. The Delaware guest statute, 21 *Del. C.* § 6101, permits a right of action by a guest passenger only for intentional misconduct or wilful or wanton disregard of the guest's rights.

This tort action by the wife against her husband was commenced in September, 1977 in the Superior Court of the State of Delaware in and for New Castle County. On June 6, 1978, the husband moved for summary judgment, asserting that the claim was barred by the doctrine of interspousal tort immunity. On February 2, 1979, the Superior Court granted Appellee's motion in an unreported decision reproduced at page A-13 of Appellant's Appendix. This decision was appealed to the Delaware Supreme Court which affirmed in an opinion dated August 16, 1979, reproduced at page A-10 of Appellant's Appendix. The Delaware Supreme Court subsequently granted plaintiff's motion for reargument, limiting that reargument to the question presented to this Court—namely, whether the doctrine of interspousal tort immunity violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. On December 26, 1979, the Delaware Supreme Court answered the stated question in the negative, and this appeal followed.

ARGUMENT.

The Appeal Should Be Dismissed or Summarily Affirmed Because it Fails to Present a Substantial Federal Question.

Appellant cites this Court to no authority standing for the proposition that there is a constitutional right for one spouse to sue his or her mate for torts allegedly committed during coverture. In *Thompson v. Thompson,* 218 U. S. 611 (1910), this Court upheld the dismissal of a wife's tort action against her husband on the basis of the interspousal immunity doctrine then extant in the District of Columbia. This Court noted:

> "Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the law making power hesitate to enact. But these and kindred considerations are addressed to the legislative, not the judicial, branch of the government." (218 U. S. at 618)

Although the Court in *Thompson* did not directly address the constitutional question raised here, it did note that the state (the District of Columbia) through the exercise of its police power had provided a number of alternative remedies to the allegedly injured spouse, including criminal prosecution, rights under divorce and alimony laws and the protection of property through the intervention of chancery. The Appellant herein, in addition to similar protections provided by Delaware law in its regulation of the marriage relationship (see Title 13, Delaware Code of 1953) has had the benefit of compensation under the

Delaware no-fault insurance plan, which is not affected by the interspousal immunity doctrine.

Every federal and state court which has had occasion to consider a constitutional challenge to the interspousal immunity doctrine has found that the doctrine is not constitutionally infirm. In *Locklair v. Locklair,* 256 F. Supp. 530 (D. S. C. 1966), the plaintiff, a South Carolina resident, sought to sue her husband as a result of injuries sustained in an automobile accident which occurred in Georgia. Georgia retained the common law doctrine of interspousal tort immunity. The court held that Georgia law applied and that the immunity doctrine was not constitutionally suspect, noting:

> ". . . [T]here is no discrimination nor denial of equal protection of the laws insofar as plaintiff is concerned, inasmuch as the Georgia law applies equally to husbands as well as to wives." (256 F. Supp. at 533).

In ordering dismissal of the action, the court noted that "plaintiff has no constitutional right to sue her husband." (*Id.*)

In *Paiewonsky v. Paiewonsky,* 466 F. 2d 178 (3rd Cir. 1971); *cert. den.* 405 U. S. 919 (1972), the Third Circuit Court of Appeals upheld the interspousal tort immunity doctrine of the Virgin Islands against a constitutional challenge. The plaintiff in *Paiewonsky,* as does plaintiff here, contended that the doctrine constituted a classification violative of the Equal Protective Clause of the Fourteenth Amendment. In rejecting that contention, the court stated:

> "Since we have not been convinced that the immunity doctrine lacks substantial vitality, we think it follows that it has a reasonable relationship to the interest sought to be furthered by it. In sum, we believe that the legislative interest in promoting

domestic tranquility is sufficiently compelling upon the facts of this case to support the classification in question." (446 F. 2d at 182).

See also *Smith v. Smith*, Pa. Super., 361 A. 2d 756 (1976); *Brawner v. Brawner*, Mo. Supr., 327 S. W. 2d 808 (1959), *cert. den.* 361 U. S. 964 (1960); *Conley v. Conley*, Mont. Supr., 15 P. 2d 922 (1932); *Smith v. Smith*, Ore. Supr., 287 P. 2d 572 (1955); *Heckendorn v. First National Bank*, Ill. Supr., 166 N. E. 2d 571 (1960), *cert. den.* 364 U. S. 882 (1960); *Wartell v. Formusa*, Ill. Supr., 213 N. E. 2d 544 (1966); *Steffa v. Stanley*, Ill. App., 350 N. E. 2d 886 (1976).

Plaintiff contends that the interspousal tort immunity doctrine must be judged by "strict scrutiny" standards because a fundamental right—marriage—is involved. She contends that this analysis is supported by the decision in *O'Neill v. Dent*, 364 F. Supp. 565 (E. D. N. Y. 1973). That case involved a challenge to a regulation of the United States Merchant Marine Academy which absolutely prohibited cadets from marrying while enrolled in the Academy and which denied admission to any person who had ever been married. The court held that the right to marry is a constitutional right and that the government cannot condition receipt of benefits (attendance at the Academy) upon waiver of fundamental constitutional rights. The court conducted an evidentiary hearing to determine whether it could be shown that there was a rational basis for the marriage prohibition and found that there was virtually no evidence supporting the defendant's claims that married students would not perform at the Academy as well as unmarried students. The court therefore concluded that the conclusive presumption against marriage was invalid under either the strict scrutiny or substantial relation tests.

The critical factor in the *O'Neill* decision, of course, is that the challenged law constituted an absolute prohibition to the right to marry. In this sense, the law was comparable to the statute invalidated by this Court in *Loving v. Virginia*, 388 U. S. 1 (1967). The severe burden on the right to marry imposed by the miscegenation law at issue in that case was based upon an explicit racial classification and was therefore condemned under the strict scrutiny standard. While total prohibition of the right to marry, particularly when based upon an invidious classification, may constitute a denial of rights guaranteed by the Fourteenth Amendment, it is clear that "marriage is a social relation subject to the state's police power." *Maynard v. Hill*, 123 U. S. 190 (1888). The interspousal tort immunity doctrine does not prohibit marriage or constitute any form of sex discrimination, and it is not based on any suspect classification. At most, the doctrine is a mere incident of marriage, properly within the scope of the state's regulatory police power.

This Court has recently considered the degree and content of permissible restrictions on the right to marry in *Califano v. Jobst*, 434 U. S. 47 (1977) and *Zablocki v. Redhail*, 434 U. S. 374 (1978). In *Zablocki*, this Court struck down a Wisconsin statute which provided that any resident having minor issue not in his custody whom he was under an obligation to support could not marry without court approval. Justice Marshall found the statute invalid because of the burden which it imposed upon the decision to marry on the part of certain indigent individuals. Justice Marshall did apply the strict scrutiny standard because of the "directness and substantiality of the interference with the freedom to marry." (434 U. S. at 387 n. 12). Nevertheless, he recognized that strict scrutiny was not appropriate for all official decisions which might have some incidental effect upon the marital relationship:

"By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with the decisions to enter into the marital relationship may legitimately be imposed. See *Califano v. Jobst* [citations omitted]. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry." 434 U. S. at 386-7.

In *Califano v. Jobst*, 434 U. S. 47 (1977), this Court upheld certain sections of the Social Security Act which provided for the termination of a dependent child's benefits upon his marriage to an individual not entitled to benefits under the Act. Justice Stevens found that those provisions did not impose an undue burden upon the decision to marry:

"Since it was rational for Congress to assume that marital status is a relevant test of probable dependency, the general rule which obtained before 1958, terminating all child's benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this. [Citations omitted]. That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby. For the marriage rule cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group, or as an attempt to interfere with the individual's freedom to make a decision as important as marriage.

The general rule, terminating upon marriage the benefits payable to a secondary beneficiary, is unquestionably valid." 434 U. S. at 53-54 (footnotes omitted).

The central teaching of *Zablocki* and *Jobst* is that strict scrutiny will be applied to a marriage-related law only when that law significantly interferes with the decision to marry or the right of marriage. In *Mapes v. United States*, 576 F. 2d 896 (Ct. Cl. 1978), a married couple challenged certain provisions of the Internal Revenue Code on the ground, inter alia, that married couples could not take advantage of the lower combined tax rates applicable to unmarried taxpayers. The Court of Claims, using a rational basis test, concluded that the challenged sections of the Internal Revenue Code did not impose an impermissible burden upon the right to marry under the Fifth Amendment:

"Admittedly, the right to marry is a fundamental right. Nevertheless, we read the *Jobst* and *Zablocki* cases together to imply that the application of strict scrutiny is appropriate where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people, as in *Zablocki*. The effect of the rates of Code Section 1 is somewhat analogous to the effect of the termination of social security benefits in *Jobst*: the elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage." (576 F. 2d at 901).

Likewise, in *Southwestern Community Action Council, Inc. v. Community Services Administration*, 462 F. Supp. 289 (D. W. Va. 1978), a county action agency brought an action for a declaratory judgment seeking a

determination of the validity of a regulation promulgated by the defendant which barred the employment of a person by an agency in a job over which a member of that person's immediate family exercised supervisory authority or served on a board or committee with authority to order personnel actions affecting his job. The court held that the regulation did not violate the due process clauses of the Fifth and Fourteenth Amendments, basing its decision upon an analysis of the distinction between the holdings in *Zablocki* and *Jobst*. 462 F. Supp. at 296-298. The court found that the regulation at issue did not "significantly interfere" with an affected couple's right to marry. 462 F. Supp. at 298.

The interspousal tort immunity doctrine in no way interferes with the right to marry and is certainly not a preclusion of that right for some persons, as were the challenged laws in *Zablocki, Loving,* and *O'Neill, supra.* Plaintiff has produced no proof that the immunity doctrine has impaired or interfered with anyone's right to marry, and it is extremely doubtful that the ability to sue one's spouse in tort enters the marriage decision making process at all.

When viewed by other than the strict scrutiny standard, it cannot be said that the interspousal tort immunity doctrine lacks any rational basis or that it does not bear a substantial relation to legitimate state interests. As noted in Appellant's jurisdictional statement, some states have judicially abandoned the interspousal tort immunity doctrine. Delaware and a number of other states, however, have chosen to retain it and to leave any changes to the will of the legislature. See generally Annotation, *Interspousal Tort Immunity,* 92 A. L. R. 3d 901 (1979). That there should be such judicial deference with respect to the doctrine is particularly appropriate in the context of

the Delaware tort scheme and statutory regulation of the marital relation. As the Delaware Supreme Court pointed out in its opinion, there would be serious, far reaching potential consequences to the marriage relation itself and its treatment within the judicial system if the interspousal immunity doctrine were to be abandoned. (410 A. 2d at 162).

Initially, it must be emphasized that under the Delaware automobile injury compensation system, primary reliance is placed upon the no-fault concept which permits compensation of injured persons such as this Appellant regardless of marital status or fault.

The second tier of the Delaware compensation system is based upon a showing of fault. Most interspousal automobile claims arise in a situation where one spouse is a guest passenger in a vehicle operated by the other spouse. Under Delaware law, 21 *Del. C.* § 6101, guest passengers have no cause of action against a host driver for negligence but can recover only upon proof of intentional harm or wilful or wanton disregard of the guest's rights. This differential treatment of guests and non-guests, based upon considerations not dissimilar from some of those justifying the interspousal tort immunity doctrine, has been upheld against equal protection and due process challenges. *Silver v. Silver,* 280 U. S. 117 (1929); *Justice v. Gatchell,* Del. Supr., 325 A. 2d 97 (1974); *Cannon v. Oviatt,* Utah Supr., 520 P. 2d 882 (1974), appeal dismissed, 419 U. S. 810 (1974), *reh. den.* 419 U. S. 1060 (1974); *White v. Hughes,* Ark. Supr., 519 S. W. 2d 70 (1975), appeal dismissed, 423 U. S. 805 (1975); *Sidel v. Majors,* 536 F. 2d 1156 (7th Cir. 1976); *cert. den.* 429 U. S. 945 (1976); *Bailey v. Pennington,* Del. Supr., 406 A. 2d 44 (1979), appeal dismissed, 48 U. S. L. W. 3517 (1980).

The applicability and validity of the Delaware guest statute suggests that the number of cases in which the interspousal tort immunity doctrine would be determinative in the automobile tort context is limited. However, the applicability of the guest statute suggests serious policy considerations to which judicial deference should be granted. It is certainly reasonable to believe, as did the court below, that suits requiring allegations of either intentional wrongdoing or wilful or wanton misconduct, are of the very nature that would tend to produce marital discord. Wilful or wanton conduct has been defined by the Delaware court to be conduct assuming the character of maliciousness or wickedness. *Bailey v. Pennington,* Del. Supr., 406 A. 2d 44 (1979).

A further, complicating policy consideration which was properly accorded weight by the Delaware Supreme Court is that under Delaware law, an alleged tort-feasor may seek contribution from another person alleged to be jointly liable to an injured person. 10 *Del. C.* §§ 6301, et seq. Frequently in cases of automobile accidents involving two or more vehicles, an injured spouse passenger will sue the driver or drivers of the other vehicles seeking personal injury compensation. In the absence of the immunity doctrine, the spouse driver could be involuntarily joined as a third party defendant for contribution and forced to defend allegations of wilful or wanton misconduct in a case brought by his or her spouse. Certainly, such involuntary interspousal suits can rationally be said to have the potential for disrupting marital harmony.

Abolition of the immunity doctrine would have potentially deleterious effects in other fields. Title 13 of the Delaware Code provides a comprehensive and coordinated statutory framework defining the rights and

obligations which flow from the marital relation. All legal actions dealing with discord in the marital relation are presently within the exclusive jurisdiction of the Family Court of the State of Delaware, which has exclusive jurisdiction, inter alia, to determine petitions for divorce, grant alimony, award child custody, make divisions of marital property and the like. 13 *Del. C.* §§ 507, 508, 721, 1504, 1512 and 1513. The abolition of the interspousal tort immunity doctrine would raise the likelihood that many marital disputes would lead not only to legal actions in the Family Court but would be accompanied by separate interspousal tort suits (and countersuits) in other courts of the state. Besides increasing the case load of the judiciary of the State of Delaware, such suits would derogate from the unitary scheme which presently exists in the Family Court for the single, comprehensive resolution of marital disputes.

Finally, as the Supreme Court of Delaware noted, Delaware law attributes many protective features to the marital relation which are not available to non-married persons, including the duty of support, the right to inherit, and the right to hold property free from a spouse's creditors as tenants by the entirety. In this context of special rights and disabilities flowing from the marital relation, it is rational for the State of Delaware to bar interspousal tort actions as being a potential source of marital disharmony. Such a limitation based on the marital relation is not constitutionally infirm, particularly in a context where the state law grants an automatic right to compensation without regard to fault, where most interspousal automobile accident cases would require proof of wilful or wanton disregard of the spouse's rights, and where abolition of the doctrine would destroy a previously established unitary framework for the resolution of all marital disputes.

CONCLUSION.

This appeal should be dismissed or the decision below affirmed because the question on which the decision depends does not present a substantial federal question.

Respectfully submitted,

MASON E. TURNER, JR.,
WAYNE N. ELLIOTT,
VERNON R. PROCTOR,
PRICKETT, JONES, ELLIOTT & KRISTOL,
1310 King Street,
Wilmington, Delaware 19801
Attorneys for Appellee.

DATED: April 22, 1980

PROOF OF SERVICE

AND NOW, TO WIT, this 22nd day of April, A. D., 1980, I hereby certify that all parties required to be served have been served copies of Appellee's Motion to Dismiss or Affirm for Want of a Substantial Federal Question, and the accompanying Brief in support of the Motion, that service has been made on Appellant pursuant to Rule 33(1) by mailing three copies, by depositing them at the United States Post Office at Wilmington, Delaware, first class postage, prepaid, on April 22, 1980, to Appellant's counsel of record: Stephen B. Potter, Esquire, P. O. Box 1207, Wilmington, Delaware 19801.

MASON E. TURNER, JR.,
PRICKETT, JONES, ELLIOTT
& KRISTOL,
1310 King Street,
Wilmington, Delaware 19801